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IN THE

Supreme Court of the United States

1947 TERM

No. 639

ROY C. METZGER, *Petitioner,*

vs.

HANNAH HOSSACK, as Administratrix of the Estate of James W. Hancer, Deceased, *Respondent.*

PETITIONER'S BRIEF IN REPLY TO RESPONDENT'S BRIEF

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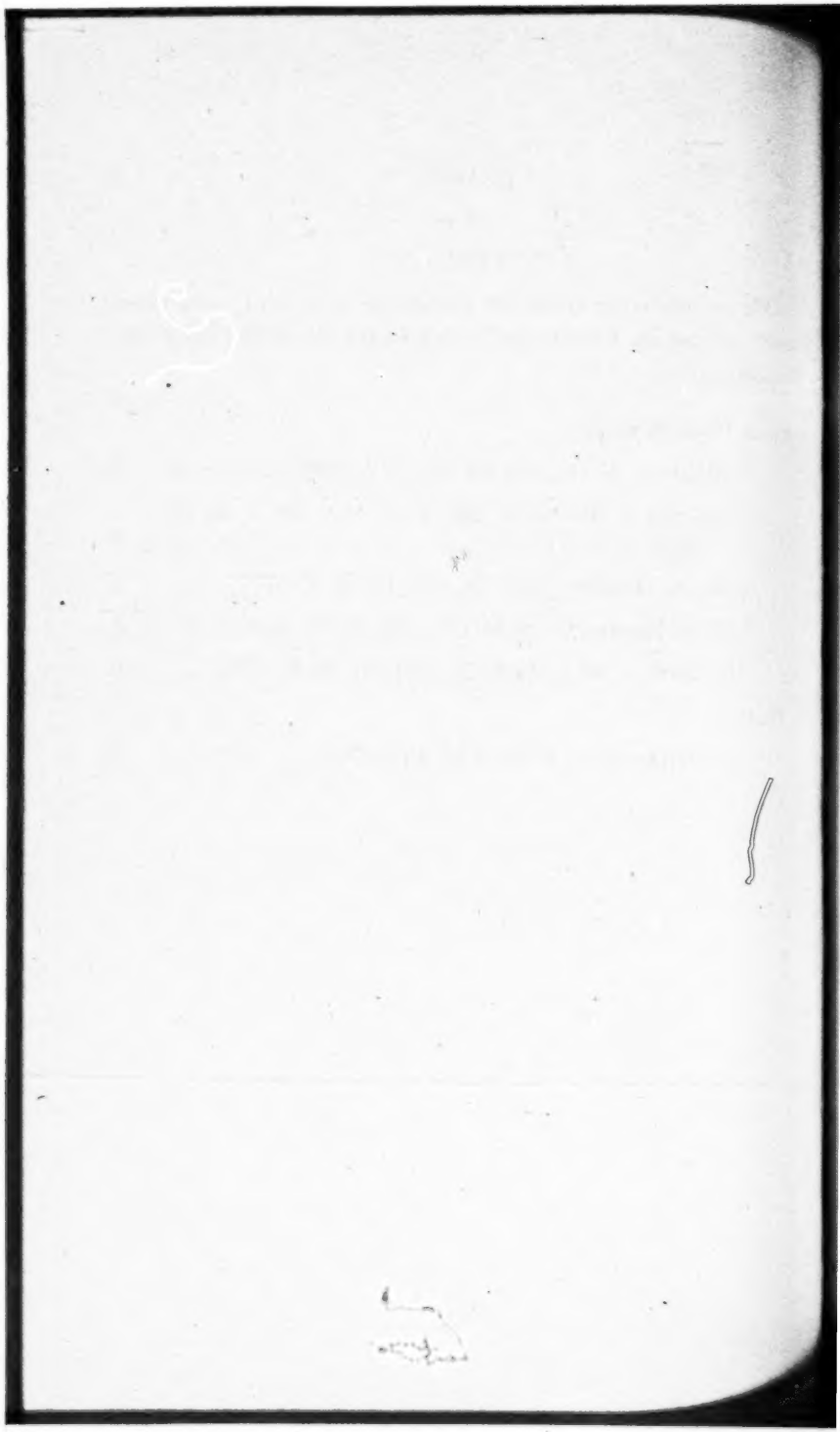


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While not required under the rules, we feel that because of the nature of cited authorities and assertions in Respondent's Brief that we should, to clarify the situation, reply to such brief.

We note Respondent asserts (R.B. 2),

> "Petitioner, however, advances the astounding proposition that when such an emergency exists, this ends the inquiry and that the law excuses the actor, no matter how foolhardy his conduct and regardless of whether the emergency makes such conduct excusable."

We certainly have not advanced or argued any such proposition in our petition for the writ of certiorari. Our position is correctly stated, in accordance with the rule in emergency cases to the general effect that where the emergency is conceded, and the emergency is not created by the actor and the actor must act in a matter of seconds to save himself from harm and uses his best judgment (which is undisputed), he is not guilty of negligence as a matter of law.

That is, the mere fact that he might have adopted some other method which possibly might have extinguished the fire, does not create a jury question; or to use the language of the court in the case of *Jones v. Hanbury,* 158 Va. 842, 164 S. E. 545,

> "If the evidence leaves it in doubt as to whether a man of ordinary prudence might have so chosen or acted, it fails as a matter of law to establish that he was guilty of negligence."

The Respondent (R.B. 3) cites authorities that the Respondent asserts, require submission to the jury the question of whether Ritter acted as a reasonably prudent man would have acted under like circumstances. The difficulty with the citations is that they do not sustain Respondent's assertion, but in fact conform to Petitioner's position. Briefly, we shall refer to each citation.

The first citation is *Restatement of the Law of Torts,* Section 296, page 796. We refer the Court to Subdivision (b) of the section cited. The last sentence correctly states the rule that Petitioner contends for, in the following language,

> "The mere fact that his choice is unfortunate does not make it improper (negligent), even though it was one which the actor should not have made had he sufficient time to consider all the effects likely to follow his action."

We might add all that the Respondent has ever claimed was that in the matter of seconds Ritter could have possibly done something differently.

The next citation is 45 *Corpus Juris, Section* 92, *page* 711. We call attention to the same authority; that is, 45 C. J. 713, Section 95, reading,

> "An emergency may arise so suddenly and unexpectedly that a prudent person would have no time to comprehend the situation and act according to the exigency, and under such circumstances *negligence cannot be predicated on the conduct of the person placed in such a situation,* even though the emergency was one consisting

of imminent peril to himself, for under such circumstances the act or omission of the endangered person is presumed to have been involuntary."

Cited in the notes under the text are several of the cases cited in Petitioner's brief, including the caste that forms the basis of the South Dakota rule, *Donahue v. Kelly,* 181 Pa. 93, 37 A. 186.

The next citation, 39 *Corpur Juris,* Section 1377, page 1200, does not have any application to the emergency rule whatsoever. It deals largely with cases where a servant was warned in construction work about danger of collapse, etc., and there existed a dispute about the facts.

The next citation is 35 *American Jurisprudence,* Section 265, page 692. In our original brief we discussed that citation and pointed out that the part of the statement that Respondent relies upon was not suppored by the cited cases. See Petitioner's original Brief, page 25.

The next case cited is *Wittstruck v. Lee,* 62 S. D. 290, 252 N. W. 874. That case did not involve the emergency rule as it was applied or attempted to be applied by the Circuit Court of Appeals. The facts disclose that there was a sharp conflict in the evidence in an automobile collision case as to who was at fault, and likewise involved the question of intentional torts.

The next case cited is *Ulrikson v. Chicago, Milwaukee, St. Paul and Pacific Railway Co.,* a South Dakota case. That is discussed in Petitioner's Brief, page 27, and is in fact favorable to the Petitioner's position.

The next case cited is *Campbell v. Jackson,* 65 S. D. 154, 272 N. W. 293. In that case the Supreme Court of South Dakota did not in any manner attempt to change the South Dakota emergency rule, as announced in Miller v. Stevens, as set forth in our petition (Petition, pages 9 and 10). That case is in full accord with our position that where automobile collisions occurred at intersections jury questions arise when there is conflicting evidence as to the location of the automobiles. The Court concluded with the following statement,

> "Even the reasonably prudent man may make an error in judgment as to what course to take when a sudden emergency is present, whereas *never will he fail to look* on approaching an intersection."

The next case cited is *Miller v. Stevens,* heretofore referred to, to which no further reference need be made.

The next case is *Elzig v. Hadwangen,* (8th Circuit), 91 F. (2d) 434. This case did not involved the application of the emergency rule and there were no facts bringing it within the principle of law here involved.

The next case cited is the case at bar dealing with the first opinion of the Circuit Court of Appeals. That has been fully discussed in Petitioner's Brief and Petition.

The last case cited is *Hercules Powder Co. v. Crawford,* (8th Circuit), 163 F. (2d) 968. A reading of that case discloses that that case involved the rule of the liability of an innkeeper for failure to awaken a guest, that his employee knew was in a room at the time of a fire, where the employee had twenty minutes to act. All the court held was that there was no emergency involved.

A reading of all of Respondent's cited authorities discloses that none sustains the position of the Circuit Court of Appeals in this case.

On page 3 of R. B., Respondent asserts,

> "Incidentally, it is interesting to note that at the trial Petitioner advanced no such contention as that which he now makes."

Inferentially, at least, the claim is made that the Petitioner herein did not except to the instructions and therefore has not preserved the question for review. These two matters demand some attention.

Evidently, Respondent overlooked that the Petitioner's position in the trial court at all times has been the same as is now being presented in this court. The Petitioner, at the close of all the evidence, moved for a directed verdict, reciting particularly the various grounds. See Printed Rec-

ord (95-99), and particularly paragraph two on page 96, dealing with the emergency rule, and also paragraph eight, page 98. In addition, the Petitioner following the verdict of the jury, Printed Record (116), made a motion for judgment notwithstanding the verdict on the identical grounds set forth in the motion for direction of verdict. This motion was likewise denied. The reason for these rulings is set forth in Printed Record (99), where the trial court said,

> "I think, in view of the opinion by the Court of Appeals in the previous trial, I don't think there is anything that would justify the Court in granting the motion at this time."

It is elementary law that when a Defendant moves for a directed verdict and sets forth the grounds and reasons for his motion, it is not necessary to subsequently take exceptions to the judge's instructions, where the judge has overruled the motion for direction of verdict. See *Elenkrieg v. Siebrecht,* 238 N. Y. 254, 144 N. E. 519, 34 A. L. R. 592, where the court said,

> "It was not necessary for defendant's counsel to except to the judge's charge in order to preserve the force and effect of his exception taken to the denial of his motion made at the end of the case. * * * Having excepted to the ruling, the defendant lost none of his rights because the judge subsequently expressed the same views more at length in his charge to the jury. One exception upon the same ruling was as good as two."

See also *Warwick v. Bliss,* 45 S. D. 388, 187 N. W. 715, and *Lyle v. Barnes,* 30 S. D. 647, 139 N. W. 338.

It is the rule now that on motions for direction of verdict and rulings at the time of the trial that no formal exception is necessary. See Rule 46 under the new Federal Rules for the guidance of trial courts, where the applicable part of Rule 46 states,

> "Formal exceptions to rulings or orders of the court are unnecessary."

See also Federal Rules, Rule 50, dealing with the motion for directed verdict and motion for judgment n.o.v.

Respondents assertion is therefore not in accord with the fact and record. Petitioner has from the very beginning assumed the very position that the Petitioner is asserting in this court. In fact, the trial court directed a verdict at the first trial in favor of Petitioner, under the theory of the emergency rule now being presented to this court.

There are some other statements appearing in Respondent's Brief that are not entirely accurate because they omit the qualification subsequently given by the witness on cross examination. See R. B. (4), where it is stated that Ritter heard the warning (R. 57), but continued winding up the reel until the smoldering spot contacted the top of the film, whereupon the whole film burst into flame (R. 20)."

We refer to the Printed Record (29), where the same witness referred to, testified,

> "Q. On the other hand the spot had to go through his hand before it could get up to the reel, didn't it?
>
> "A. Yes. * * *
>
> "Q. You don't recall when Harry got that up near enough, whether he tried to pull it lengthwise and put out the fire?
>
> "A. I could not tell you."

We refer to the further statement in R. B. 4, "That twelve to fifteen seconds elapsed between the warning and contact between the spark and the main body of the film (R 21)." We refer to the Printed Record (21), at the top of the page, where it appears that the twelve to fifteen seconds refers to the time "from the moment you noticed the spark" up to the time it touched the main body of the film and flashed, as being twelve to fifteen seconds.

It of course omits from consideration the fact that the same witness did not claim to know when the spark of fire started and likewise omits important considerations of elements of time, such as the witness's mental reaction and elapsed time to form a decision to express the words, "Harry,

your film is on fire, tear it off." It omits from consideration the fact that the actor, Ritter, was busily engaged with his attention directed upon his work. It omits from consideration the element of time to react to the expression, the time to turn and make an observation and the undisputed evidence that the film with the fire thereon was being turned up and passed through his hands and flashed and burned his hand in a matter of brief seconds, and likewise omits from consideration the fact that the undisputed evidence of tests made by chemists and others with stop watches, show that the flash time of such an expanding spot is two seconds; it also omits as shown by Respondent's witness, that no one would know what a person would do under such circumstances. (R. 40.)

In view of Respondent's citations and this situation appearing in Respondent's Brief, the error of the Circuit Court of Appeals is apparent. It is equally apparent that the decision is in conflict with another decision of the First Circuit Court of Appeals, in conflict with the South Dakota decision and in conflict with substantially all decisions where an emergency is conceded, not created by the actor, and the actor's time to act gives neither time to reason nor time to form a judgment. As already stated, the actor has neither hindsight nor foresight. In such a situation, no jury question is presented. The writ should be granted.

Respectfully submitted,

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